

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: August 30, 1996

TO: Gerald Kobell, Regional Director, Region 6

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Sidney Square Convalescent Center, & Personal Care Residence, Case 6-CA-27897

524-5079, 524-5079-2800, 524-5079-2813, 524-5079-2831, 524-5079-4250, 524-8365, 524-8372

The Region submitted this case for advice on whether an employer in the health care industry violates Section 8(a)(3) by permanently replacing employees who participate in an economic strike when a union makes an offer to return to work simultaneously with issuing the 8(g) 10-day notice of intent to strike.

FACTS

The Employer operates an intermediate and skilled nursing home. Service Employees International Union, Local 585 (the Union), represents three bargaining units: (1) all full-time and regular part-time certified and non-certified nursing assistants, central supply orders, aides, laundry aides and activities aides; (2) all full-time and regular part-time licensed practical nurses; and (3) all registered nurses. There are approximately 105 employees represented by the Union at the Employer's facility.

The most recent collective-bargaining agreement for the first two units was effective by its terms from February 10, 1993, to November 30, 1995. The parties have not yet reached an initial agreement for the unit of registered nurses.

On December 29, 1995, in the midst of negotiations, the Union provided the Employer a Section 8(g) 10-day notice stating:

Pursuant to the Taft-Hartley amendments, you are hereby notified that the aforesaid Union shall begin to engage in a strike, picketing and other concerted refusal to work activities beginning at 7:00 A.M. on Monday, January 15, 1996, in Pittsburgh, Pennsylvania.

On Tuesday, January 16, 1996, at 7:00 A.M. the bargaining unit members shall return to work under their current terms and conditions of employment. Employees shall report to work for their regularly scheduled shift beginning at or after 7:00 A.M. on Tuesday, January 16, 1996.

On January 11 and 12, the Employer handed each employee a memorandum which asked whether the employee would work during the strike. It appears that none of the employees responded that they were willing to work. After the Employer determined that it would need a minimum of approximately 30 employees to work on January 15 on the three shifts, it commenced seeking replacements it needed to service the residents. The Employer did not seek to hire temporary employees from an outside employment agency because it felt that temporary employees might not cross the Union's picket line. Rather, the Employer determined that, in order to insure that sufficient staff would be present on January 15, it needed to offer permanent positions to the replacements. All replacements were orally advised prior to January 15 that they were being hired on a permanent basis. All replacements scheduled to work during the day shift were present at the facility prior to the start of that shift.

The strike took place on January 15 as planned. Five unit employees chose not to participate in the strike and reported to work. On January 16, when they reported for work, 24 returning strikers were informed that they had been permanently replaced. The replaced employees were the least senior employees by classification and by shift. Prior to the end of March, the Employer had returned all but one of the 24 replaced employees to work. The Employer terminated a number of replacement employees for unsatisfactory job performance while other replacement employees resigned.

ACTION

We conclude that the Employer lawfully replaced the economic strikers with permanent replacements because the Union's offer to return was not unconditional. Accordingly, the Region should dismiss this allegation, absent withdrawal. ⁽¹⁾ Initially, we conclude that the Employer was privileged to hire permanent, rather than temporary, replacements for the strikers.

The law provides that an employer may permanently replace economic strikers prior to their request for reinstatement to their jobs. *NLRB v. Mackay Radio & Telegraph*, 304 U.S. 333, 345-346 (1938). In *Mackay*, the Supreme Court stated:

Nor was it an unfair labor practice to replace striking employees with others in an effort to carry on the business. Although section 13 of the act...provides, "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike," it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment in order to create places for them. (Footnote omitted.) *Id.* at 345-346.

We reject the Union's contention that the Employer must provide a legitimate business justification for utilizing permanent employees rather than temporary ones. The established law is to the contrary. In *Hot Shoppes, Inc.*, ⁽²⁾ the Board stated:

We, however, disagree with the Trial Examiner's premise that an employer may replace economic strikers only if it is shown that he acted to preserve efficient operation of his business. The Supreme Court's decision in *Mackay Radio & Telegraph Company* and cases thereafter, although referring to an employer's right to continue his business during a strike, state that an employer has a legal right to replace economic strikers at will. We construe these cases as holding that the motive for such replacements is immaterial, absent evidence of an independent unlawful purpose. Therefore, we reject the Trial Examiner's conclusion that the plan to replace the economic strikers here was itself improper...

In *Belknap, Inc. v. Hale*, ⁽³⁾ in which permanent replacements successfully sued an employer who had terminated them pursuant to a strike settlement with a union, the Supreme Court majority quoted the above passage from *Hot Shoppes* and noted that there were no Supreme Court decisions that required "a different conclusion." *Id.* at 504-505 fn. 8.

Thus, both the Supreme Court and the Board have stated that an employer is not required to establish that offers of permanent tenure to strike replacements must be justified by showing that the offer of permanent employment was necessary to keep a business in operation during a strike. More recently, in *Choctaw Maid Farms, Inc.*, ⁽⁴⁾ the ALJ, who was affirmed by the Board, stated, "If striking employees are economic strikers, the law allows an employer to hire permanent replacements. What its state of mind might be in exercising that right is irrelevant." ⁽⁵⁾ Therefore, we conclude that there is no merit to the Union's argument that the Employer must establish that temporary employees were unavailable or refused to work. ⁽⁶⁾

However, once strikers have made an unconditional request for reinstatement and a vacancy still exists, an employer must permit their return, absent a showing of "legitimate and substantial business justification" for the failure to offer full reinstatement. See *Harvey Mfg.*, *supra*, at 466.

This case raises the question of whether the Employer could hire permanent replacements where the Union informed the Employer that the employees intended to return to work when it gave its strike notice, before the Employer hired replacements. The Employer makes essentially two contentions in its defense. First, it contends that the Union's offer to return to work after employees engaged in a strike was conditioned on the employees first engaging in a one-day strike. ⁽⁷⁾ Second, the Employer contends that by combining notice of when employees intended to return to work with its 8(g) notice, the Union was, in essence, attempting to deprive the Employer of its *Mackay* rights to hire permanent replacements.

As to the first defense we conclude that the Union did not make an unconditional offer to return to work. "No specific words are required to make an offer unconditional; an application for reinstatement will not be treated as conditional unless an employee, or his agent, has given the employer reason to conclude that any offer of equivalent employment would be

rejected." Continental Industries, Inc., 264 NLRB 120-121 (1982), citing Hartmann Luggage Company, 183 NLRB 1246 (1970).⁽⁸⁾ As the ALJ stated, with Board approval, in Keller Manufacturing, 272 NLRB 763, 806 (1984):

The Board requirement that an unconditional offer to return at the end of a strike be made before any obligations or liability on the part of employer attaches is not based upon semantics. The Board only requires that the offer be expressed and be intelligible to the employer. In any case... the circumstances necessarily must influence any determination of whether a proper offer to return to work was made by the strikers or on behalf of the strikers.⁽⁹⁾

In the context of the instant case, the Union's December 29, 1995 letter by its terms was not an unconditional offer to return to work but was premised on the employees first engaging in a one-day strike. Thus, it would have been futile for the Employer to offer employees reinstatement at any time between December 29 and January 15, before the strike actually commenced. In our view, there was no obligation on the Employer's part to offer reinstatement until the employees had actually engaged in a one-day strike. Therefore, the Employer was free to hire permanent replacements before the strike began.

In addition so we find a policy-based reason for concluding that the Employer was free to hire permanent replacements, specifically, that the Union may not deprive the Employer of its Mackay rights.

Employers and unions are permitted wide latitude in their choices of bargaining tactics. See NLRB v. Insurance Agents, 361 U.S. 477 (1960), where the issue was whether "tactics which the Act does not specifically forbid" violate Section 8(b)(3). The Supreme Court found that a union's engaging in a slowdown was not an impermissible economic tactic, but drew the distinction between lawful but unprotected activity and unlawful activity. Thus, in Randall Bearings, Inc., 213 NLRB 824 (1974), a union violated Section 8(b)(3) by refusing to work overtime for the purpose of compelling the employer to agree to contract modifications during the term of a collective-bargaining agreement, without complying with the strike notice requirements of Section 8(d)(4). The ALJ, at 827, specifically rejected the Union's reliance on Insurance Agents.

In the instant case, by announcing the date the employees intended to return to work at same time the Union gave the Employer the 8(g) notice of intent to strike, the Union attempted to gain for economic strikers the advantage of the right to immediate reinstatement, the right the law affords only to unfair labor practice strikers and economic strikers who were not permanently replaced. Granted, there is nothing in the case law that specifically prohibits the Union from making an unconditional offer to return to work after a strike at the same time it issues its 8(g) notice.⁽¹⁰⁾ On the other hand, the Union may not utilize this notice to deprive the Employer of its right to hire permanent replacements when faced with the prospect of an economic strike. Finding the Union's notice of intent to return to work effective here would eviscerate the Employer's Mackay right and would significantly distort the balance of power between parties involved in a labor dispute such as this.⁽¹¹⁾

We also note that in this case there is no justification for limiting the Employer's rights to hire replacements to the lesser ones it would have if the Union had engaged in an unfair labor practice strike. The Region has concluded that the Employer did not discriminate in the manner in which employees were replaced (the least senior were replaced), did not try to undermine employees' replacement rights, and tried to limit the number of employees it replaced.⁽¹²⁾

In sum, we conclude that the Union's offer to return to work was conditioned on its first engaging in a strike. Accordingly, because the Union had not made an unconditional offer to return to work and because the Employer otherwise had the right to hire permanent replacements when it hired those replacements, the Employer did not violate Section 8(a)(3) and (1) when it refused to reinstate striking employees who had been permanently replaced.

B.J.K.

¹ The Region has retained other portions of the charge for processing.

² 146 NLRB 802, 805 (1964).

³ 463 U.S. 491 (1983).

⁴ 308 NLRB 521, 528 (1992).

⁵ See also *Harvey Manufacturing, Inc.*, 309 NLRB 465, 466-468 (1992), where, in determining whether replacements were permanent or temporary, the Board discussed what the replacements had been told, without reference to any claims of business necessity to hire replacements on either a permanent or a temporary basis. See also *J.M.A. Holdings*, 310 NLRB 1349 (1993), where the Board merely noted, and gave legal weight to, the employer's "policy" to hire permanent replacements.

⁶ Even if the Employer did have to provide a business justification, it would prevail here. When the Employer hired the replacements, the strike had not yet commenced, none of the employees had responded to the Employer's letters asking if anyone planned to work during the strike, and the facility was undergoing a state licensing inspection, including inspections of its nursing and support functions. Thus, the Employer's action was both reasonable and fair under the circumstances. In this regard, we find no legal basis to differentiate between the Employer's treatment of nursing and non-nursing personnel. First, the Employer does not have to justify its decision as to what classification of employees it decided to replace, because it had no obligation to justify its decision to hire permanent replacements. Second, it would be difficult to argue that the Board is able to determine better than the Employer what its particular staffing needs are. In any event, it seems reasonable that laundry, dietary and housekeeping staff would be just as important to patients as nursing staff on any particular day.

⁷ The Employer has the burden for showing that the offer to return was not unconditional, *Soule Glass and Glazing Co., et al v. NLRB*, 652 F.2d 1055 (1st Cir. 1981).

⁸ See generally also *United States Service Industries, Inc.*, 319 NLRB 231, 251-252 (1995).

⁹ Compare *Anaheim Plastics, Inc.*, 299 NLRB 79 (1990) (the union's offer to return to work did not place a time limitation on the employees' return to work and the union's refusal to offer a no-strike guarantee did not convert its unconditional offer to return to work into a conditional one) with *Indiana Ready Mix*, 141 NLRB 651 (1963) (union's offer to cease striking during a 30-day negotiating period not an unconditional offer to return to work).

¹⁰ Compare *Randall Bearings*, *supra*; *Central Management Co.*, 314 NLRB 763, 770 (1994) (Insurance Agents does not permit a party to announce its intention to violate the Act during negotiations).

¹¹ *Cf. NLRB v. Fansteel*, 306 U.S. 240, 252 (1939) (union cannot use sitdown strikes to deprive employer of right to use its property during labor dispute).

¹² We note our departure from the conclusion in *Redstone Highlands Health Care Center, Inc.*, Case 6-CA-27179 et al., Advice Memorandum dated November 7, 1995, where the conditional nature of the union's offer to return after engaging in a strike was not as clear. Redstone is similar to the instant case in that both employers permanently replaced employees who intended to participate in an economic strike after the unions informed the employers that strikers would be returning to work the day following the strike. However, the employer in Redstone was not completely deprived of its Mackay rights because the notice to return was not simultaneous with the notice of intent to strike. In Redstone, the employer could hire replacements between March 31, the date of the 8(g) notice, and April 11, the date of the letter to the employer informing him that the strike would start on April 12 and last approximately 24 hours, and that employees would return to work as scheduled on April 14. Moreover, the Redstone employer engaged in discriminatory treatment of employees, including, inter alia, discriminatorily choosing employees for replacement, prohibiting employees from wearing union insignia and disciplining them for refusing to remove them, and reporting employees to the state department of health and the nurses' licensing board. Thus, it could be said that there was some theoretical justification for affording the Redstone strikers the same rights to immediate reinstatement that unfair labor practice strikers would receive. However, there is no justification for affording the economic strikers in the instant case the same benefit.